Supreme Court, U.S.
FILED
0016 JUL 0 3 2000
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No. .

IN THE

Supreme Court of the United States

MICHAEL MULLETT,

Petitioner,

v.

MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., and MERRILL LYNCH & COMPANY, INC., and JACK HARABURDA and STEPHEN M. STREETER

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should grant Certiorari to resolve a conflict among the Circuits on the proper standard for granting a motion to compel securities industry arbitration under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. 4, where the existence of an agreement to arbitrate is in dispute and where the party opposing arbitration has made a demand for a jury trial on that issue?

2. Whether a state court, in applying the Federal Arbitration Act, may properly deny a litigant a right to a jury trial where such right is demanded, and where the party making the demand raises a genuine issue of material fact as to the existence of an agreement to arbitrate?

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL MULLETT,

Petitioner

vs.

MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC.,
and
MERRILL LYNCH & COMPANY, INC., and
JACK HARABURDA and STEPHEN M. STREETER,

Respondents

Michael Mullett respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania, (App., *infra.*, 1a), is unreported. The Orders of the Superior Court of Pennsylvania. (App., *infra.*, 2a and 3a) are unreported. The opinion of the Court of Common Pleas of Philadelphia, County, Pennsylvania, (App., *infra.*, 5a-14a), is unreported. The Orders of the Court of Common Pleas of Philadelphia County, Pennsylvania. (App., *infra.*, 15a-16a, 17a-18a), are unreported.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgment docketed on April 4, 2000. (App., *infra.*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISION INVOLVED

Section 4 of the Federal Arbitration Act, 9 U.S.C.§4, provides, in relevant part, that where the existence of an agreement to arbitrate is in controversy that:

> Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.

9 U.S.C.A. §4

STATEMENT

The Petitioner is Michael Mullett, a stockbroker and former employee of Respondent Merrill Lynch, Pierce, Fenner, and Smith, Inc. ("Merrill Lynch"). Petitioner was discharged from employment with Merrill Lynch in January, 1999. In February, 1999, he sued Respondents Merrill Lynch, Pierce, Fenner, and Smith Inc., its parent company, Merrill Lynch and Co. Inc., and Respondents Stephen M. Streeter and Jack C. Haraburda (two employees of Merrill Lynch) in the Court of Common Pleas of Philadelphia County, Pennsylvania. Petitioner brought breach of contract claims against the corporate defendants, and defamation claims against both the corporate defendants and the individual defendants. All Defendants moved for an order staying proceedings and referring Petitioner's claims to mandatory securities industry arbitration. Petitioner opposed that motion and on May 13, 1999, the trial court granted the motion (App., *infra.*, 17a). Petitioner filed a timely appeal from that order to the Superior Court of Pennsylvania, which quashed the appeal as interlocutory on September 16, 1999. (App., *infra.*, 3a). Petitioner thereafter filed a motion for re-argument or reconsideration in the Superior Court, which was also denied, on November 4, 1999. (App., *infra.*, 2a). Petitioner then filed a timely petition for allowance of appeal in the Pennsylvania Supreme Court. The Pennsylvania Supreme Court treated the petition for allowance of appeal as a petition for review.[1] In

[1]Under Pennsylvania appellate practice, a petition for allowance of appeal is discretionary; a petition for review invokes the mandatory appellate jurisdiction of the Supreme Court

a *per curiam* order of April 4, 2000, that court denied the petition for review, without opinion. (App. *infra.*, 1a) Petitioner made a timely demand for jury trial on the issue of the existence of an agreement to arbitrate. (App. *infra.*, 40a) This was ignored at the trial level, and at every level throughout the Pennsylvania appellate system. In response to the Motion to compel arbitration, Petitioner, while admitting that he signed a portion of a multi-page "Form U-4" which by its boilerplate purported to bind him to arbitrate certain claims against Merrill Lynch. (App., *infra.*, 28a), nevertheless denied the existence of legal consideration for this alleged agreement to arbitrate (App., *infra.*, 29a). Merrill Lynch and the other Respondents, in an affidavit in support of their motion, asserted that Mullett's signing of the Form U-4 in August, 1987 was "as a condition of his obtaining securities industry registration with and/or through the NASD and NYSE." (App., *infra.*, 43a). As of August, 1987, however, Mullett had already been licensed by both the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"), since March, 1978. (App., *infra.*, 29a). Thus, the record below raised a square contradiction on the issue of legal consideration, and certainly a genuine issue of material fact as to whether there was a contractual undertaking to arbitrate. While Mullett asserted numerous grounds for relief from this alleged agreement to arbitrate, the keystone of his opposition to arbitrate was the lack of legal consideration for the alleged agreement entered into in August, 1987, as there was no bargained for exchange between him and Merrill Lynch at that time. Petitioner maintained below and maintains before this

Court that this raised a genuine issue of material fact, thus mandating a trial under Section 4 of the FAA on the issue of an agreement to arbitrate.

A. The Federal Arbitration Act and Securities Industry Arbitration

Congress, in passing the FAA, created a statutory mechanism for both federal and state courts to enforce certain arbitration agreements. Over recent decades, mandatory arbitration provisions have become widespread in the securities industry, governing disputes between brokerage concerns and their customers, and also between brokerage firms and registered securities representatives, like the Peittioner. The industry's standard form agreement now in use in the employment setting is the "Form U-4," which provides, *inter alia*, for mandatary arbitration of certain employment-related disputes between registered representatives and their employers under the arbitration rules of either the National Association of Securities Dealers ("NASD"), or the New York Stock Exchange ("NYSE").

Section 4 of the FAA provides that a court, as a threshold matter, must determine whether an agreement to arbitrate has been made. Section 4 further provides that where the existence of an agreement to arbitrate is in controversy, the court must order a jury trial on that discrete issue. Certiorari is now sought to review the Pennsylvania Supreme Court's failure to follow this section of the Act.

This Petition does not seek mere correction of an error below. It addresses the important federal question of the

standard a trial court (state or federal) must use in deciding a motion for arbitration under section 4 of the FAA, where, as here, the existence of the arbitration agreement is in direct controversy. There is disagreement among the federal circuits on this important point of federal law. The Third Circuit, in *Par-Knit Mills Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51 (3rd Cir. 1980), holds that "when considering a motion to compel arbitration that is opposed on the ground that no agreement to arbitrate had been made between the parties, [the court] should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." *Id.*, at 54. *Par-Knit* holds that the standard of review is comparable to that of a motion for summary judgement under federal practice: the burden of establishing a right to specific performance of an arbitration agreement is on the moving party, and where there is a genuine issue of material fact raised by the party opposing the motion, the matter is to be submitted to a jury, upon proper demand. To a similar effect are cases in the Second Circuit. *See, e.g.*, EL Hoss Engineering & Transport Co., Ltd. v. American Independent Oil Company, 289 F.2d 346 (2d Cir., 1961). A contrary view is taken by the U.S. Court of Appeals for the Fifth Circuit, which, in *Bhatia v. Johnston*, 818 F.2d 418 (5th Cir. 1987), held that the burden of showing the entitlement to jury trial under section 4 of the FAA is on the party who opposes arbitration. **("As the party resisting arbitration, Bhatia has the burden of showing that he is entitled to a jury trial under Section 4 of the Arbitration Act." Ibid., at 422).**

B. Proceedings Below

Mullett filed a timely, sworn response to the motion of the Respondents in the Court of Common Pleas of Philadelphia County, disputing the existence of the agreement to arbitrate, citing, *inter alia*, the lack of legal consideration with respect to the Petitioner's signature on one page of a multi-page Form U-4 document which was signed in 1987, some twelve years before the dispute arose giving rise to the instant litigation. (App., *infra*, 27a - 40a). In addition to filing a verified answer to the motion, Petitioner also furnished a separate affidavit setting forth the history of his employment with Merrill Lynch, and denying the existence of legal consideration for his alleged agreement to arbitrate, (App., *infra,* 19a). Petitioner also made a timely demand for jury trial. (App., *infra*, 40a). The trial court, in an opinion filed August 10, 1999 (following the Petitioner's appeal to the Pennsylvania Superior Court) summarily found, notwithstanding the disputed factual record before it, that "the signed form U-4 was a valid agreement to arbitrate." (App., *infra*, 14a). There was no evidentiary hearing below. The trial court did not discuss Section 4 of the FAA, nor did it specifically address Mullett's demand for a jury trial on the disputed issue of the alleged agreement to arbitrate. After the trial court granted the Respondents' Motion, Mullet made a timely petition for reconsideration at the trial level, which was denied. He then filed an appeal to the Superior Court of Pennsylvania, which was quashed as interlocutory. After reconsideration was denied by the Superior Court, he filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which that court treated as a petition for review. The Pennsylvania Supreme Court, in an April 4, 2000 per curiam order, denied the petition for review.

REASONS FOR GRANTING THE PETITION

A. There is a Division of Authority among the Circuits

There is a split of authority among the federal circuits concerning the standard to be utilized in deciding a motion to compel arbitration under section 4 of the FAA. The Third Circuit's standard of review is squarely inconsistent with that of the Fifth Circuit. Further, the cases arising in the Second Circuit support the Third Circuit view, i.e., that such motions are to be treated as motions for summary judgment. This is a significant area of federal law, involving as it does the enforcement of agreements to arbitrate. Such agreements are not only widespread in the securities industry, but are increasingly prevalent in other employment-related settings, and in many consumer transactions. *See, e.g.*, Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). Increased litigation in both state and federal courts can be foreseen in this area, given the popularity of such arbitration agreements in the boilerplate in both employment and consumer contracts. Thus, uniformity of decision among the federal courts of appeals, and among the state supreme courts, would be promoted by a grant of certiorari, and clear definition of the standard on this issue by the Court.

It is unlikely that the conflict will be resolved in the federal circuits. *Par-Knit* has been the law in the Third Circuit since 1980. *Bhatia* has stood in the Fifth Circuit since 1987. The question of the standard of review on such motions is apt

to have continuing future consequences for litigants in both federal and state courts, given the proliferation of mandatory arbitration agreements.

The importance of the federal question raised, and the conflict among the circuits, compels serious certiorari consideration. *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 400 (1947). Further, an important issue of federal statutory application is at stake. *Shapiro v. United States*, 335 U.S. 1, 4 (1948). There is need for a uniform rule on this significant federal issue. Cf. *Commisioner v. Bilder*, 369 U.S. 499, 501 (1962). Certiorari should be granted on this question of importance, which has not been specifically addressed and answered by the Court, and on which the circuits are divided. *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 507 (1982).

The question is ripe. It has gathered momentum for some two decades in the circuits, and uniformity has not evolved. It is unlikely that further ferment among the circuits will bring about uniformity, or a harmonized standard of review.

In sum, the question has sufficient and widespread importance to warrant a grant of certiorari.

B. <u>An Important Constitutional Right is Involved.</u>

A significant Constitutional issue is involved, the right to jury trial guaranteed by the 6th Amendment to the United States Constitution, in a setting where Congress specifically provided for a right to a jury trial. The question presented is beyond the mere academic, involving as it does an important

constitutional right. *Cf. Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955).

C. No State Grounds Existed to Support Decision Below

This is not a case where there were adequate state grounds to uphold the decision of the Pennsylvania Supreme Court. The trial court specifically invoked and applied the FAA, and relied on federal law in its decision. State courts are bound by federal common law standards when they apply the FAA. This decision was affirmed by the Pennsylvania Supreme Court. It is urged that no court - state or federal - should, under the FAA, be free to disregard a genuine issue of material fact concerning the existence of an agreement to arbitrate. The record disclosed a genuine issue of material fact on this point. The trial court, confronted with conflicting affidavits on the core issue of legal consideration, nevertheless summarily found that an arbitration agreement existed, thus foreclosing Petitioner's right to trial by jury as mandated by Congress.

Further, this is an issue which, given its broad sweep, has importance beyond the rights and liabilities of the parties to the instant controversy. The trial court denied Petitioner his Congressionally mandated right to a jury trial, on the issue of an agreement to arbitrate.

D. The Pennsylvania Supreme Court's Decision Conflicts with the Third Circuit Court of Appeals Interpretation, and Exacerbates a Preexisting Split of Authority among the Federal Circuits.

There was no adequate non-federal ground for the decision below. Where there is a conflict between a decision of the highest state court and a federal court of appeals on a matter of federal law, it is proper for this court to accept Certiorari review. *Katzinger v. Chicago Metalic Manufacturing Co.*, 329 U.S. 394 (1947); *McGregor v. Westinghouse Co.*, 329 U.S. 402 (1947). Indeed, where the federal question has been seen to be sufficiently important, and involves, as does the instant case, a state court decision on the application of a federal statute, Certiorari has been granted. *Kolobrat v. Oregon*, 366 U.S. 187, 190-191 (1961).

In, *Par-Knit v. Mills*, the Third Circuit faced the same issue as the Pennsylvania Court system did in this case. It decided the controversy differently.

There is little realistic prospect for resolution of this far reaching conflict without a decision by the Court. If the Court does not grant certiorari, there will be a continuation of these two views, one imposing the burden of carrying a motion to compel arbitration upon the party seeking it, the other imposing the burden of proof upon the party who denies the existence of the arbitration contract. Further, at the state court level, decisions of this sort are often seen (correctly or not) as not subject to appellate review, being interlocutory. *See, e.g., Chem-Ash, Inc. v. Arkansas Power and Light Co.*, 296 Ark. 83, 751 SW2d 353 (1988). Thus, as a result of the practical difficulty of securing appellate review, state courts may well

continue to make decisions of this sort, thus denying parties who dispute the existence of a binding agreement to arbitrate the right to trial by jury under section 4 of the FAA.

E. The Federal Question Presented is Important

Review of the decision below is important because of the cloud which the division among the Circuits, and the State courts places upon an important provision of the Federal Arbitration Act, in an era where private commercial arbitration (often by contracts of adhesion) looms as a frequent mechanism for use in dispute resolution, in lieu of jury trial. The court below erred in holding, summarily, that the party seeking enforcement of an arbitration agreement cannot be put to the test of a jury trial, where the record disclosed a crisp contradiction on the core issue of legal consideration to support the contract. The congressional mandate of Section 4 was simply not observed below. Continuation of this practice will frustrate the specific Congressional mandate that a jury trial be ordered in such cases. Further, clarification of the standard of proof on a motion to enforce an arbitration agreement will serve the important federal purpose of making this standard uniform among the Circuits, and also among the state courts which entertain jurisdiction over such motions under the FAA.

The Court has prime responsibility for the federal judiciary, and has repeatedly accepted cases for certiorari to construe, for example, the Federal Rules of Civil Procedure. *See Hickman v. Taylor*, 329 U.S. 495 (1947). It should accept certiorari in this case.

The Federal Arbitration Act clearly establishes a federal policy in favor of arbitration. *Mitsubishi Motors Corp. v. Soler*

Chrysler-Plymouth Inc., 473 U.S. 614 (1985). A court must, however, first determine whether the parties agreed to arbitrate the dispute. *Id.* To do so, courts deciding such motions must look to the body of federal arbitration law. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Given the strong federal policies militating in favor of arbitration, it is particularly important that procedural and substantive requirements imposed upon the courts by Congress, in section 4 of the FAA, be observed.

In *Celotex Corp. v. Catrett*, 477 U.S.317 (1986), this Court accepted for review a trilogy of cases in order to clarify and refine the proper standards for summary judgement under FRCP 56(c). Therein, the Court granted Certiorari to resolve divergent views among the federal circuits concerning the proper standard for grant of a motion for summary judgement under FRCP 56(c). Certiorari is similarly justified in this case.

The Court held in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), that the FAA applies to state court as well as federal court proceedings. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983), the court held that the effect of section 2 of the Act is to create "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the Act." *Id.*, 460 U.S. at 24.

Moses H. Cone, supra, made it clear that federal law under the FAA governs, whether the FAA is invoked in state or federal court. *Moses H. Cone, supra*, 460 U.S. at 24. Problems under the FAA are not confined to the federal courts. Nor is there any suggestion in federal jurisprudence that congress intended, in passing the FAA, to make arbitration agreements enforceable only in the federal courts. *See Southland Corp. v. Keating*, 465 U.S. at 13. As noted by the Court in *Southland*

Corp., "... the House Report contemplated a broad reach of the Act, unencumbered by state law constraints." *Southland Corp. v. Keating*, 465 U.S. at 13.

While the Act was motivated by a congressional intent to enforce agreements into which parties had entered, it cannot be overlooked that a threshold determination is mandatory on whether in fact an arbitration agreement exists. It is urged that arbitration agreements should not be presumed, notwithstanding the strong federal judicial and congressional policies favoring arbitration. Where the existence of the agreement is in controversy, the provisions of section 4 should be followed.

The court has granted certiorari in significant matters arising under the Federal Arbitration Act on prior occasions. See, e.g., *Mastrobouno v. Shearson Lehman Hutton Inc.*, 514 U.S. 52 (1995), in which the Court granted Certiorari to resolve differing views among the federal Circuits on the issue of whether a contractual choice of law provision precluded an arbitral award of punitive damages that otherwise would have been proper. Importantly, the Court has noted that "... the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobouno, supra*, 514 U.S. at 57. It follows that the mere existence of a pro arbitration policy in federal jurisprudence does not militate in favor of the finding of an agreement to arbitrate, where one does not exist. While this Court has also held that doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, *Moses H Cone, supra*, 460 U.S. at 24-25, this principle is operative only where there is an agreement to arbitrate.

In sum, the Circuits as well as the state courts are in significant disagreement on a matter of importance to the securities industry, to employees in that large and important industry, as well as the broad host of commercial and consumer contracting parties who, (typically by adhesion) find themselves signatories to agreements to arbitrate. This case presents an opportunity for the Court to give guidance to the Circuits on the proper standard of proof in this important area. This case also presents an opportunity for the Court to address an important area of federal law concerning the administration of civil justice, in both state and federal courts which has never been addressed by this Court. Therefore, the Court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BY:_____

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APPENDIX A- ORDER OF THE SUPREME COURT OF PENNSYLVANIA, APRIL 4, 2000

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MICHAEL MULLETT,	:	No. 172 E.D. Misc. Dkt. 1999
Petitioner	:	
	:	
	:	
MERRILL, LYNCH, PIERCE,	:	
FENNER & SMITH, INC. AND:		
JACK HARABURDA AND	:	
STEPHEN M. STREETER ,	:	
	:	
Respondents	:	

ORDER

PER CURIAM:

AND NOW, this 4th day of April, 2000, the Petition for Allowance of Appeal, treated as a Petition for Review, is denied.

TRUE COPY FROM RECORD

Attest: **APR 4 2000**

John W. Person, Jr. Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX B – ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA, SEPTEMBER 16, 1999

IN THE SUPERIOR COURT OF PENNSYLVANIA

Michael Mullett	:	
	:	
v.	:	(C.P. Phila.Cnty. No. 2086
	:	February Term, 1999)
	:	
Merrill, Lynch, Pierce,	:	
Fener & Smith, Inc., et al	:	No. 1754 EDA, 1999
	:	Filed: November 4, 1999
	:	

ORDER

Appellant's motion for reconsideration of this court's order of September 16, 1999 is **DENIED**.

Per Curiam

APPENDIX C- ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA

		IN THE SUPERIOR COURT OF PENNSYLVANIA
Michael Mullett	:	
	:	
v.	:	(C.P. Phila. Cnty. No. 2086
	:	February Term, 1999)
Merrill, Lynch, Pierce,	:	
Fener & Smith, Inc.,	:	
	:	No. 1754 EDA, 1999
	:	Filed: September 16, 1999
	:	

ORDER

This appeal has been taken from the May 13, 1999 order granting the defendants' motion to stay proceedings and compel arbitration.

Although a party may take an appeal from an order denying an application to compel arbitration, there is no corresponding authority that allows an appeal from an order that compels arbitration. ***Maleski v. Mut. Fire Ins.***, 534 Pa. 575, 633 A.2d 1143 *(1993); **see Campbell v. Fitzgerald Motors,*** 707 A.2d 1167 (Pa. Super. 1998) (order directing arbitration, whether statutory or common law, is an interlocutory order and not immediately appealable); ***compare 42 Pa. C.S. § 7320(a)(1)*** (an appeal may be taken from a court order denying an application to compel arbitration).

Since this appeal has been taken from an interlocutory order, the appeal at No. 1754 EDA, 1999 is hereby **QUASHED**.

Per Curiam

APPENDIX D- OPINION OF THE COURT OF COMMON PLEAS, PHILADELPHIA COUNTY, AUGUST 10, 1999

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT OF PENNSYLVANIA CIVIL TRIAL DIVISION

MICHAEL MULLETT	:FEBRUARY TERM, 1999
	RECEIVED
	AUG 10 1999
	CIVIL ADMINSTRATION
v.	: No. 2086
	:
MERRILL LYNCH,	:
MERRILL LYNCH PIERCE	:
FENNER & SMITH,	:
JACK HARABURDA, and	: Superior Court Docket
STEPHEN STREETER	: No. 01754EDA99
	:

.....

OPINION

SHEPPARD, JR., J.....August 10, 1999

This Opinion is submitted in support of this court's Order granting defendants' Motion to Stay Proceedings and

Compel Securities Industry Arbitration. For the reasons set forth, this court's Order should be affirmed.

BACKGROUND

Plaintiff, Michael Mullett ("Mullett"), was employed by defendant, Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") from October 1977 through January 18, 1999. Mullett alleges that his position as a financial consultant with Merrill Lynch was pursuant to an employment contract created by a deferred compensation and bonus program. According to him, this deferred compensation and bonus program constituted an inducement to remain in the employ of Merrill Lynch. Mullett contends that he remained employed at Merrill Lynch in response both to this inducement and in consideration of the implied good faith promise of Merrill Lynch that he would not be dismissed from employment before the maturity of the deferred compensation program.

In connection with his employment with Merrill Lynch, Mullett applied for and obtained registration with the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") as a Merrill Lynch "registered representative" and "associated person". As part of the registration process, Mullett executed a Uniform Application for Securities Industry Registration or Transfer, commonly referred to as "Form U-4". The Form U-4 included the following agreement to arbitrate: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . ."

In January, 1999 Mullett received a letter from Merrill Lynch advising him that he was being discharged from his employment. This lawsuit was filed as a result of his discharge. Mullett alleges that the reasons for discharge stated in the letter were unfounded and consequently, his discharge constituted a breach of contract by Merrill Lynch. Mullett also contends that Merrill Lynch and co-defendants Jack Haraburda and Stephen M. Streeter defamed him before his discharge by falsely stating to third parties that he was retiring for health reasons.

Defendants argue that this court is not the proper forum to resolve Mullett's grievances. Specifically, defendants point to the Form U-4 signed by Mullett and urge that the parties are bound by the agreement to arbitrate.

This court determined that the Form U-4 and it's arbitration clause were controlling, and therefore, granted defendants' Motion to Stay Proceedings and Compel Securities Industry Arbitration. Mullett now appeals.

DISCUSSION

(1) A Binding Agreement to Arbitrate Exists Between the Parties

The Federal Arbitration Act, 9 U.S.C. §§ I et seq. ("FAA"), was enacted to make agreements to arbitrate enforceable to the same extent as other contracts. Section 2 of the Act provides, in relevant part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration

> a controversy arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract.

Ultimately, "[t]he effect of this section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Memorial Hosp. v. Mercury Construction C1 460 U.S. 1, 25 (1983). The intent of the FAA was to ensure rigorous enforcement of arbitration agreements by the courts. Dean Witter Revnolds. Inc. v. Byrd, 470 U.S. 213, 221 (1985). The court's role is limited to determining whether the parties have agreed to arbitrate and whether the issues fall within the scope of the arbitration agreement. Id. at 649. If the court finds that the parties have agreed to submit to arbitration, then every reasonable effort must be made to enforce such agreements. Williams v. Gruntal & Co., 447 Pa. Super. 357, 361, 669 A.2d 387, 388 (1995).

Mullett argues that he did not assent to the arbitration clause found in the Form U- 4 and that even if there was ostensible "assent", it does not bind him because the Form U-4 was an unconscionable contract of adhesion. This court was not persuaded by this argument..

Mullett does not dispute the fact that he signed a Form U-4 agreement. In fact, he readily admits signing a Form U-4 which contained a general arbitration clause.[1] Moreover, the argument that the Form U-4 is a contract of adhesion has

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[1] See Plaintiff s Memorandum of Law in Opposition to Defendant's Motion to Stay Proceedings and Compel Arbitration, page 5.

been rejected by the United States Supreme Court in Gilmer v. Interstate/Johnson Lane Cgrp., 500 U.S. 20 (1991). Unequal bargaining power is not enough to make an arbitration agreement a contract of adhesion. Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 184 (3d Cir. 1998). Even if the Form U-4 were a contract of adhesion, it would not be unenforceable since its terms do not unreasonably favor the other party. Ld., See also, Witmer v. Exxon CoQ2., 495 Pa. 540, 434 A.2d 1222, 1228 (Pa. 1981).

Courts have consistently held that Form U-4 arbitration agreements are covered by the Federal Arbitration Act. See, e.g., Gilmer v. Interstate/Johnson Lane CoQ2., 500 U.S. 20 (199 1) (Form U-4 requires arbitration of claims under ADEA); Seus v. John Nuveen & Co., Inc., 146 F.3d 175 (3d Cir. 1998) (same); First Liberty Investment Group v. Nicholsberg, 145 F.3d 647 (3d Cir. 1998) (reversing denial of motion to compel arbitration on the basis that former employee's breach of contract claim was subject to arbitration based on Form U-4 and NASD Code); Stanton v. The Prudential Insurance Co., et. al., No. 98-4989, 1999 U.S. Dist. LEXIS 5547 (E.D. Pa. April 22, 1999) (federal and state employment-related disputes must be arbitrated according to signed Form U-4).

The Form U-4 executed by Mullet incorporates Section 10101 of the NASD Code of Arbitration Procedure, which provides in pertinent part that: [t]his Code of Arbitration Procedure is prescribed and adopted ... for the arbitration of any dispute, claim or controversy . . arising out of the employment or termination of employment of associated person(s) with any member." Section 10101 further specifies that the obligation to arbitrate such claims runs not only

between associated persons and the member firm, but also "between or among members or associated persons." (See Exhibit "B" to Defendant, Merrill Lynch's Motion.)

Furthermore, NYSE Rule 347 (which is made applicable by plaintiff s agreement in the Form U-4) specifies that: "[a]ny controversy between, a registered representative and any, member or member organization arising out of the employment or termination of employment of such registered representative by and with such member organization shall be settled by arbitration. . ." (See Exhibit "C" to Defendant, Merrill Lynch's Motion.)

In summary, this court submits that a valid agreement to arbitrate existed between Mullett and the defendants, Merrill Lynch, Haraburda and Streeter, due to their status as a "member firm" and "associated persons", respectively.

(II) This Dispute is Within the Scope of the Agreement to Arbitrate

A. Breach of Employment Contract Claim

Essentially, Mullett claims a breach of contract by Merrill Lynch. Mullett stresses that when he signed the Form U-4 in 1987, NASD rules did not require arbitration of employment disputes. Although the NASD rules in effect in 1987 did not expressly state that employment disputes were subject to arbitration, the rules, were amended in 1999) to explicitly provide for it. Most courts that have examined the issue, including the Third Circuit, have found that the pre-amendment rules do cover employment disputes. Seus v. John Nuveen & Co., Inc., 146 F.3 d at 185. Admittedly, the

Seventh and Ninth Circuits hold otherwise. However, that authority is not controlling here.

Mullett further argues that the FAA cannot act as an enforcement mechanism for the purported arbitration agreement because the FAA does not apply to contracts of employment of workers in interstate commerce. "Commerce", as defined in the FAA, includes "commerce among the several States." 9 U.S.C. § 1. "Contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" are excluded from the scope of the FAA Id. The Gilmer court held that the Form U-4, however, is a "contract evidencing a transaction in commerce" and not a "contract of employment" within the meaning of the FAA. 500 U.S. at 25 n.2. The Third Circuit has also held that the "contract of employment" exception is limited to the contracts of employees, such as seamen and railroad workers, that are directly engaged in the channels of interstate commerce. See Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 226-227 & nn.20-21 (3d Cir. 1997).

Thus, Mullett's breach of employment contract claim was not excluded from the FAA, but instead fell within the scope of the arbitration agreement and the FAA.

B. Defamation Claims

Mullett's remaining three claims sound in defamation. Those claims, too, should be arbitrated. According to the terms of Form U-4 and the amended NASD rules, all claims must be arbitrated if they "arise out of the employment or

termination of employment of associated person(s) with any member." The relevant inquiry as to the state tort claims is whether they "involve significant aspects of the employment relationship or whether resolution of the tort claims will require evaluation of either the employee's or the employer's performance in the course of the employment relationship." Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316, 324 (E.D. Pa. 1996).

In this case, Mullett's defamation claims against the defendants are based on alleged representations made to third parties that Mullett left or retired from the brokerage business for health reasons. The Complaint alleges that the defendants "defamed the plaintiff in matters directly germaine to his trade or profession." See Plaintiff s Complaint at Paragraph 35. In Paragraph 36 of the Complaint, Mullett further maintains that the defendants "deliberately and systematically" advised his clients that he had retired from the financial industry due to health reasons. These defamation claims concern Mullett's status as a broker and implicate the impact of that status on his clients. Thus, Mullett's defamation claims stem directly from his employment relationship with the defendants and involve significant aspects of that relationship. Accordingly, they should be arbitrated.

CONCLUSION

A strong policy favoring arbitration underlies the FAA. "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been

signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). State courts are equally bound to these requirements. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

This court respectfully submits that the signed Form U-4 was a valid agreement to arbitrate. It was proper, therefore, to stay the proceedings in state court and compel Securities Industry Arbitration of plaintiff s claims. For these reasons, the appeal should be denied and this court's Order affirmed.

BY THE COURT,

_____

ALBERT W. SHEPPARD, JR., J.

APPENDIX E – ORDER OF THE COURT OF COMMON PLEAS, PHILADELPHIA COUNTY, JUNE 9, 1999

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MICHAEL MULLETT	:COURT OF COMMON PLEAS PHILADELPHIA COUNTY
vs.	:
	FEBRUARY TERM, 1999
MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., and	:
MERRILL LYNCH & COMPANY, INC., and	:NO. 2086
JACK HARABURDA, and STEPHEN M. STREETER	: 052768
	:

ORDER

AND NOW, this 9th day of June 1999, upon consideration of the Motion of Plaintiff, Michael Mullet for Reconsideration of this Court's Order of May 13, 1999, staying proceedings pending completion of contractual arbitration, and the response (if any) of the Defendants thereto, it is hereby ORDERED that the said Motion is **DENIED**.

BY THE COURT:

_____

APPENDIX F – ORDER OF THE COURT OF COMMON PLEAS, PHILADLEPHIA COUNTY

MICHAEL MULLETT, Plaintiff	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MERRILL LYNCH & COMPANY, INC., JACK HARABURDA, and STEPHEN M. STREETER Defendants.	FEBRUARY TERM, 1999 NO. 2086, 040213

ORDER

AND NOW, upon consideration of Defendants' "Motion Pursuant to 9 U.S.C. §§ 3-4 to Stay Proceedings and Compel Securities Industry Arbitration", and Plaintiffs response thereto, it is hereby **ORDERED** that said Motion is **GRANTED**:

1. The claims alleged by Plaintiff against Defendants in this action are subject to a valid agreement to arbitrate, 9 U.S.C. §§ 2-4;

2. Pursuant to Sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 3-4, this action shall be stayed pending the arbitration if any of Plaintiffs claims before

either the National Association of Securities Dealers, Inc. or the New York Stock Exchange, Inc.;

3. Pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, the arbitration in this matter shall be held in Philadelphia, Pennsylvania; and

4. To effectuate the judgment of this Court that Plaintiff's claims are arbitrable, this action is hereby stayed subject to any appropriate filing at a later date, pursuant to Sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. §§ 9-10, to confirm, vacate and/or modify any duly rendered final decision following the arbitration of this matter.

APPENDIX G – SWORN STATEMENT OF MICHAEL C. MULLETT

MICHAEL MULLETT	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
vs.	FEBRUARY TERM, 1999
MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., and MERRILL LYNCH & COMPANY, INC., and J ACK HARABURDA, and STEPHEN M.STREETER	NO. 2086

SWORN STATEMENT OF MICHAEL Q. MULLETT

1. I am Michael C. Mullett, the Plaintiff in the captioned case. I am 49 years of age. I was born December 8, 1949.

2. I am a 1972 graduate of the University of Dayton. I majored in Secondary Education, with a Major in English, and Minor in Business. From 1972 to 1973, 1 was employed as a school teacher in the Dayton, Ohio public school system. Between 1974 and 1975, 1 worked for a shipping company as an assistant to the CFO, and from 1976 to 1977 as a manufacturer's representative for a manufacturing company.

3. I joined Merrill, Lynch, Pierce, Fenner & Smith, Inc. in or around October, 1977. 1 was hired as an account

executive trainee. This was my first employment in the securities industry. I was first employed by Merrill Lynch at its Ft. Lauderdale, Florida office. I worked at the Ft. Lauderdale office from October, 1977 to March, 1979. During this time, I was involved in company training, from October, 1977 through March, 1978 in Florida and in New York, NY, and began sales production from April, 1978 through March, 1979 at the Ft. Lauderdale office.

4. In or around April, 1978, 1 was assigned as an account executive at Merrill Lynch's Ft. Lauderdale office. I remained employed as an account executive at the Ft. Lauderdale office from March, 1978 to approximately March, 1979. At that time, I was relocated by the company to its office in Bala Cynwyd, Pennsylvania. I was in Bala Cynwyd as an account executive from approximately March, 1979 until approximately May, 1991. In or around May, 1991, the Bala Cynwyd office was undergoing a physical renovation. By that time, my title changed to financial consultant. Certain financial consultants were given the option of working at Merrill Lynch's Valley Forge office. I was one such financial consultant. I transferred to the Valley Forge office, arriving there in May, 1991, and remaining there as a financial consultant until approximately June, 1992. In or around 1985, 1 received the added title of Vice President.

5. In or around June, 1992, 1 transferred to Merrill Lynch's Jacksonville, Florida office. I was employed at the Jacksonville office as a financial consultant from approximately June, 1992 until December, 1993.

6. In or around December, 1993, 1 was placed on a prescribed and paid medical/leave of absence, and was instructed by Merrill Lynch that I could return to my job following rehabilitation. After completing a six-week rehabilitation program, I was instructed not to return to the Jacksonville, FL office, and that my medical leave could continue. My accounts were distributed to various brokers in the Jacksonville office, and I was told that I was to remain on paid leave of absence pending further instructions. In December, 1994, the Jacksonville Branch Manager told me that my salary would be ending. I told her ____that I could not work in the Jacksonville office. In November of 1994, 1 was taken on as a financial consultant position in Bala Cynwyd, PA. At the conclusion of that leave of absence, I resumed work as a financial consultant, in or around December, 1994, at the Merrill Lynch office in Bala Cynwyd, PA. My employment at Merrill Lynch's Bala Cynwyd, PA office as a financial consultant was continuous from December, 1994, through the time I was discharged by the company in January, 1999. My last several weeks of official employment with Merrill Lynch were spent on medical leave, due to complications concerning chronic hypertension, as well as development of a cancerous tumor on my left arm, which necessitated surgical removal.

7. I have examined the Motion of the Defendants, Merrill, Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch & Company, Inc., Jack Haraburda, and Stephen M. Streeter, Pursuant to 9 U.S.C. §§3-4 to Stay Proceedings and Compel Securities Industry Arbitration, together with the exhibits to said Motion. In particular, I have examined Exhibit "A" to said Motion, the same being a copy of a "Form U-4"

(Uniform Application for Securities Industry Registration or Transfer"), the said document consisting of four (4) pages. Three (3) pages of the Form U-4, as presented, do not contain my signature. I do not recall ever having placed my signature upon any of the original first three pages of the Form U-4, although the said Form U-4 does correctly identify me as Michael Charles Mullett in its introductory section. I do not believe that I was shown the first three pages. Page 4 of the Form U-4 does contain my signature in the lower middle right-hand portion, above the line stating "signature of applicant."

8. Since 1977, I have been employed exclusively in the financial services industry. I am not a lawyer, nor am I a graduate of any law school. I have never taken a formal law course, with the exception of one business law course when I was an undergraduate. My sole "legal" training has consisted of the necessity that I become familiar with certain rules and regulations governing the every day conduct of persons employed as financial consultants.

9. My only familiarity with the securities arbitration system has been two (2) instances in which customers made arbitration claims against me. One such arbitration resulted in a decision in my favor. The other arbitration claim resulted in a decision for the claimant in an amount just over three thousand dollars.

10. My best recollection of the circumstances surrounding my signing page 4 of the Form U-4 is that at the time I executed page 4 of the "Form U-4" described as Exhibit "A" to the Defendants' Motion, I did not read the

form. I believe, to the best of my recollection, that the last page (page 4) of the form was handed to me by my manager's secretary in the middle of a trading day. I was told to sign the form to update the company's records. I have no recollection of signing the first three pages, and I believe that I did not sign them. I do not believe that the first three pages were shown to me. At that time, I was unaware that paragraph 5 of page 4 of the form purportedly set forth an agreement to arbitrate disputes between myself and my employer and associated persons. I had no legal advice or legal consultation at the time I signed page 4 of the Form U-4, nor was it ever suggested to me that I should seek such.

11. At the time I signed page 4 of the Form U-4 on or about August 4, 1987, 1 did not read the form. I believe, to the best of my recollection that it was presented to me in a perfunctory way while I was on the telephone conducting trades in the middle of a trading day I was completely unaware of the implications of any claimed agreement to arbitrate. Since that time, I have, in the course of the instant litigation, learned that I was supposedly waiving the right to trial by jury. I am now aware that there are rights guaranteed by both the United States Constitution and the Pennsylvania State Constitution. I was unaware of this in 1987. 1 never intended to waive any such constitutional rights. Had I known, as of August 4, 1987 that execution of the Form U-4 was a waiver of such rights, I would have protested the requirement that I sign this form, and I would not have signed the form.

12. As of August 4, 1987, 1 was also unaware that trial in an arbitration forum could involve, potentially,

assessment of forum fees upon me, as a claimant in such forum. It is my present understanding that forum fees, depending upon the nature and complexity of the case, as well as the manner of the processing of the arbitration claim, can be tens of thousands of dollars. I understand that there are no such comparable "forum fees" which are assessed in courts of record, either in the U.S. federal system, or the Pennsylvania state court system. Had I been aware of this aspect of mandatory arbitration, I would have protested the requirement that I sign the Form U-4, and I would not have signed the Form U-4. I have also become aware, since August, 1987, that the securities arbitration system (either under the auspices of the NASD or the NYSE) is a system in which the arbitrators can, and frequently are, selected from the management establishment of the securities industry. I have also learned that it is the official internal policy of the NASD to extend extremely close scrutiny to punitive damages awards in the arbitration forum of the NASD. I have also become aware that the NASD has discussed proposals to cap punitive damages in the arbitration forum. I have also become aware that there are limited rights to pretrial discovery in the NASD and NYSE arbitration fora. I have learned that there is typically no right of pretrial discovery in such fora. I have also learned that arbitrators in the NASD have historically been trained and instructed not to provide written findings of fact or conclusions of law, thus rendering an appeal to a court of record from an arbitration decision to be extremely difficult, if not practically speaking impossible, I have also been made aware, during the instant litigation, that the rights of appeal following an arbitration are limited. Had I been aware of any or all of these circumstances regarding arbitration at the time I was

required to sign the Form U-4 in August, 1987, 1 would not have signed this form.

13. As of August 4, 1987, 1 was already licensed by the NASD, as well as the NYSE. I had enjoyed this status since approximately March, 1978, and had been working as a securities dealer for some nine (9) years before I signed the Form U-4. My employer's requirement that I sign the Form U-4 was never explained to me, other that it was routine paper work to update the company's records.

The forgoing statements are made by me under 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

4/25/99
Date

MICHAEL C. MULLET

APPENDIX H – ANSWER OF PLAINTIFF, MICHAEL C. MULLETT, TO MOTION OF DEFENDENTS PURSUANT TO 9 U.S.C. §§ 3-4 TO STAY PROCEEDINGS AND TO COMPEL SECURITIES INDUSTRY ARBRITATION

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MICHAEL MULLETT	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
vs.	
MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., and MERRILL LYNCH & COMPANY, INC., and JACK HARABURDA, and STEPHEN M. STREETER	FEBRUARY TERM, 1999 NO. 2086

ANSWER OF PLAINTIFF, MICHAEL MULLETT, TO MOTION OF DEFENDANTS PURSUANT TO 9 U.S.C. §§34 TO STAY PROCEEDINGS AND TO COMPEL SECURITIES INDUSTRY ARBITRATION

1. Denied as a conclusion of law without need of further response under the Pennsylvania Rules of Civil Procedure. By way of further response, but not in derogation of the foregoing, the Federal Arbitration Act, 9 U.S.C. §1, et seq., ("FAA") does not have within its purview employment agreements, pursuant to the language of §1 of the Act, which specifically excludes such agreements from the coverage of the Act.

By way of additional response, but not in derogation of the foregoing, there existed no valid and/or enforceable agreement to arbitrate the instant dispute, by reason of the fact that the purported document upon which the Defendants rely (the Form U-4) was obtained under duress, was a document of adhesion, and represents an unconscionable term of an agreement, being thus unenforceable pursuant to Pennsylvania law, federal law, or any other applicable law. The "Form U-4" relied upon by the Defendants was a document which purported to contain an agreement to arbitrate any employment dispute. However, Defendants Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Merrill Lynch & Company, Inc. (hereinafter "Merrill Lynch Defendants") required Plaintiff Mullett to sign said U-4 document, on August 4, 1987, notwithstanding the fact that he was already in the employ of these Defendants since 1977. Further, the said document purports to be a waiver of Mr. Mullett's constitutional right to trial by jury in a civil matter, under the Seventh Amendment to the United States Constitution, (applicable to the states by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution), and his right to a trial by jury in a civil case pursuant to the provisions of the Pennsylvania

Constitution. To such extent, if any, as the Court considers that the U-4 document is applicable to these proceedings, the same was an alleged waiver of constitutional rights by Mr. Mullett. The said waiver was neither voluntary nor was it intelligent and/or knowing.

By way of additional response, but not in derogation of any of the foregoing, there existed no legal consideration for any alleged agreement by Mr. Mullett to arbitrate claims against the Merrill Lynch Defendants (which arbitration agreement is hereby specifically denied), in lieu of trial of such matters in a judicial forum. At the time of Mr. Mullett's execution of the Form U-4 on or about August 4, 1987, Mr. Mullett had already been employed for approximately ten (10) years with the Merrill Lynch Defendants, having been initially hired in October, 1977. He was a registered representative of the firm from and after March, 1978, when he completed an examination administered by the NASD. NYSE licensure followed automatically, without separate examination. Plaintiff's State of Florida licensure followed in or around May, 1978, after a separate examination was administered. Plaintiff was licensed by the NASD and NYSE in or around March, 1978, upon completion of the Merrill Lynch training program. Plaintiff was also licensed by various states, including but not limited to, the States of Florida and Pennsylvania. Plaintiff has only a vague recollection of having signed the Form U-4, and believes that he signed it as a request by management to update their files. The Plaintiff's history of employment with Merrill Lynch, and the circumstances of his signing of the Form U-4, are set forth in his Sworn Statement attached as Exhibit "A" hereto. No new legal consideration was given or obtained by either party to the alleged bargain as of the time of the execution of

said Form U-4, the same being a mere redundancy upon what was already Mr. Mullett's status as a registered representative licensed by both the NASD and the NYSE. To such extent as the Court may consider that the Form U-4 contains the recital of an agreement to arbitrate, there was no valid consideration for said purported agreement. Thus, in the absence of a valid and enforceable agreement, there exists no legally binding contract to arbitrate.

2. Denied as a conclusion of law without need of further response under the Pennsylvania Rules of Civil Procedure. By way of further response, but not in derogation of the foregoing, §4 of the FAA only requires court action where there is, in fact, a valid agreement to arbitrate. Plaintiff denies the existence of a valid agreement to arbitrate, for those reasons set forth in paragraph 1 hereof and in his accompanying Brief, which are incorporated herein by reference. By way of additional response, but not in derogation of the foregoing, the provisions of the FAA are not applicable to an employment contract, as such contracts are specifically excluded from the coverage and purview of the FAA, by the very terms of §1 of the said Act.

3. It is admitted that Michael Mullett is a former Merrill Lynch employee whose employment with Merrill Lynch was terminated by the corporate Defendants herein on or about January 18, 1999. It is further admitted that Plaintiff is currently employed at Prudential Securities, Inc., a securities brokerage firm and a member of the National Association of Securities Dealers ("NASD") and the New York Stock Exchange (IMSE11).

4. Admitted.

5. Admitted.

6. Denied as stated. It is admitted that Defendant Jack Haraburda is a Complex Manager and Vice President employed by Merrill Lynch, with supervisory responsibilities extending over the Merrill Lynch Bala Cynwyd office. It is specifically denied that at material times, Mr. Haraburda was the branch manager of the Merrill Lynch Bala Cynwyd office. On the contrary, at material times, the branch manager of the Bala Cynwyd office was Mr. Kevin Waldron, an employee of Merrill Lynch who is not a party to this action.

7. Denied as stated. It is admitted that the Defendant Stephen Streeter was at material times an administrative manager employed by Merrill Lynch. It is further admitted that at material times, Mr. Streeter had certain oversight responsibilities extending to the Bala Cynwyd, Pennsylvania office of Merrill Lynch where the Plaintiff was employed at material times. The Complaint names Mr. Streeter as a Defendant, both individually and in his capacity as an employee of Merrill Lynch.

8. It is admitted that at material times, the Plaintiff applied for and obtained registration with both the NASD and the NYSE (as well as with other organizations) as a "registered representative" of Merrill Lynch. However, Plaintiff was already registered with the NASD and the NYSE as early as March, 1978. Specifically, on or about August 4, 1987, the Plaintiff signed a certain "Form U-4". At the time of his execution of the Form U-4, Mr. Mullett had already been employed as a registered representative of Merrill Lynch, since 1977. Mr. Mullett in fact enjoyed status

as a registered representative of both the NASD and NYSE for several years prior to August 4, 1987, by reason of which fact his execution of the Form U-4 at that time was a redundancy. By way of further response, but not in derogation of the foregoing, while it is admitted that the Plaintiff signed a certain written form entitled a "Form U-4", the same was not an agreement between the Plaintiff and the Merrill Lynch Defendants but, rather, was merely an application which the Plaintiff made for registration as a securities representative under the auspices of the NASD and NYSE, of which organizations the Plaintiff was already a registered dealer, as of August 7, 1987. By way of further response, but not in derogation of the foregoing, the Plaintiff incorporates by reference his averments contained in paragraph 1 hereof as though the same were more fully set forth at length, denying that the said Form U-4 constituted an enforceable agreement between himself and the Merrill Lynch Defendants. By way of further response, but not in derogation of any of the foregoing, to such extent, if any, as the U-4 Form is deemed binding upon the Plaintiff as concerning dealings between himself and the Merrill Lynch Defendants, the said agreement in no way bound the Plaintiff with respect remedies as to the tortious conduct by the individual Defendants, Streeter and Haraburda. By way of additional response, but not in derogation of the foregoing, Plaintiff believes and avers that both the NYSE and NASD arbitration systems are dominated by the securities industry, i.e., by the management side of the instant dispute. Securities arbitration systems are part of a scheme whereby the securities industry forms self-regulating organizations ("SRO's") to police themselves. This is done pursuant to 15 U.S.C. §78(a)- (s). The securities firms which comprise both the NYSE arbitration system and the NASD arbitration

system are called "member firms" of the SRO's (which include the Merrill Lynch Defendants), govern the SRO's as part of the statutory self-regulating scheme. SRO's, in turn, run and determine nearly all aspects of the arbitration processes under which the Merrill Lynch Defendants now assert that Mr. Mullett must submit his employment dispute. Merrill Lynch is a member firm of both the NYSE and the NASD. As recently as 1996, the Chairman of Merrill Lynch was a member of the board of the NYSE. The foregoing circumstances have been recognized by a court of record, to wit, the United States District Court for the District of Massachusetts, in the case of Rosenberg v. Merrill, knch, Pierce, Fenner & Smith, Inc., 99 F. Supp. 190, 207 (D. Mass. 1998), reversed on other grounds, Rosenberiz v. Merrill, Lmch, Pierce, Fenner & Smith, Inc., F.3d (1st Cir. 1998). (*See*htp\\www.law.emory.edu\onecircuit\dec98\98 1246.01a. html.) The structure of both NYSE arbitration and NASD arbitration is inherently biased against securities industry employees, thus failing to ensure that there are norms and standards of arbitral impartiality. In the NYSE, minimal standards of arbitral independence are not in existence. The rules that govern arbitral procedure, those that determine the selection of arbitrators and the details of discovery practice are all dominated by the NYSE. Merrill Lynch, in turn, assists in governing the NYSE. As early as 1995, the only member of the NASD's National Arbitration Committee with experience in employment law cases was an officer with Merrill Lynch. Significant factual issues concerning the lack of impartiality of the NASD arbitration system in the securities industry were discussed in connection with sworn testimony furnished by Deborah Masucci in the matter of Duffield v. Robertson Stephens & Co., et al., U.S. District Court for the Northern District of California, Case No. C95-

0109-CAL. A copy of Ms. Masucci's deposition in said case is attached as Exhibit "A" to Plaintiffs Brief. At the deposition, Ms. Masucci, a 1980 graduate of the New York Law School, testified that she was the Vice President and Director of Arbitration at the NASD (Exhibit "A" to Plaintiff's Brief at p. 6). She further testified that she has been Vice President of the NASD since January of 1991, and its Director of Arbitration since August, 1983 *(Ibid.)*. At Ms. Masucei's deposition, she testified that the NASD's National Arbitration Committee employment law expertise was Tom Smith, who was, as of the time of Ms. Masucci's deposition testimony, an officer with Merrill Lynch (Exhibit "A" to Plaintiffs Brief at pp. 11-12). NYSE rules describe the arbitral system as follows:

> The Chairman of the Board of Directors [of the NYSE] ... shall appoint, subject to the approval of the Board of Directors, a Board of Arbitration to be composed of such number of present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of Directors as the Chairman of theBoard of Directors shall deem necessary to serve at the pleasure of the Board of Directors . . .. Rule 633, NYSE Rules at p. 30, quoted by the Court in Rosenberg, *supra, 995 F. Supp. at 210.*

The Chairman of the Board of Directors of the NYSE likewise appoints the Director of Arbitration for the NYSE, who, according to Rule 6.5 of the NYSE, is required to be "one of the officers or employees of the Exchange", and who reports directly to the Senior Vice President and Secretary of

the NYSE. The foregoing has been corroborated in sworn testimony furnished by James Edward Buck, Senior Vice President and Secretary of the NYSE, taken in the case of Duffield v. Robertson Stephens & Co., United States District Court for the Northern District of California, Case No. C95-0109- CAL, on July 26, 1995. Mr. Buck testified in that deposition that he reports directly to the Chairman of the NYSE (Buck deposition at pp. 4-6).

By way of further response, but not in derogation of the foregoing, Plaintiff asserts that any alleged agreement to arbitrate is not enforceable by reason of the fact that both the NYSE and NASD are fora which do not provide fair and impartial means for dispute resolution between persons such as Plaintiff and corporate members of the securities industry, such as the Merrill Lynch Defendants.

9. Plaintiff incorporates herein by reference thereto paragraphs 1 and 8 thereof as though the same were more fully set forth at length. It is specifically denied that the Plaintiff executed the U-4 Form "in order to obtain his securities industry registration with the NASD and NYSE" as, at the time of the execution of said U-4 Form, Mr. Mullett was already registered with the NASD and NYSE. It is admitted that the Plaintiff indicated the NASD and NYSE with respect to the Form U-4 (?). By way of additional response, but not in derogation of the foregoing, as of August 8, 1987, the Plaintiff was already a registered representative of both the NASD and the NYSE, thus rendering the Form U-4 a redundancy. By way of additional response, but not in derogation of the foregoing, it is specifically denied that the Plaintiff agreed to arbitrate claims as alleged by the Defendants herein in paragraphs 9-

10 of their Motion, for those reasons more fully set forth in paragraph 1 hereof.

11. Denied as stated. The applicability of the NASD code of arbitration procedure is denied, as there does not exist a valid and/or enforceable agreement to arbitrate. By way of additional response, Plaintiff alternatively avers that to such extent as the Court may consider or conclude that Plaintiff is bound by any alleged agreement to arbitrate his claims against the Merrill Lynch Defendants and Defendants Streeter and Haraburda, as of August 4, 1987, (the time of Mr. Mullett's execution of the Form U-4), the NASD code of arbitration procedure did not provide for mandatory arbitration of employment disputes.

12. Denied as a conclusion of law without need of further response under the Pennsylvania Rules of Civil Procedure. By way of further response, but not in derogation of the foregoing, it is specifically denied that the Plaintiff has any contractual obligation whatsoever to arbitrate claims which he has against the Merrill Lynch Defendants. It is also specifically denied that the Plaintiff has any legal obligation to arbitrate claims against alleged "associated persons", i.e., Defendants Streeter and Haraburda. Plaintiff has set forth independent tort claims against Haraburda and Streeter for defamation, which defamatory acts have occurred during the last several weeks of Mr. Mullett's employment with the Merrill Lynch Defendants, and which have continued on a pattern following his discharge. The Plaintiff is not required to arbitrate his claims against the Merrill Lynch Defendants, nor is he obliged to arbitrate his claims against the individual Defendants Haraburda and Streeter.

13. Denied as stated in that NYSE Rule 347 speaks for itself. By way of additional response, it is further specifically denied that the Plaintiff was, at any material time, contractually obligated to arbitrate his claims against these Defendants. By way of further response, but not in derogation of any of the foregoing, to such extent (if any) as this Court may consider that the Plaintiff is bound by any agreement to arbitrate, such agreement to arbitrate does not extend to the tort claims pleaded by the Plaintiff against the Merrill Lynch Defendants and the individual Defendants Streeter and Haraburda.

Plaintiff incorporates herein by reference thereto the averments of paragraph 1 hereof as though the same were more fully set forth at length, and specifically denies that there is or has, at any material time, been a valid and/or enforceable agreement to arbitrate.

14. Denied as stated, in that the record in these proceedings speaks for itself. The Plaintiff commenced his suit via the filing of a Complaint on February 16, 1999. That Complaint was thereafter served upon the Defendants Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Merrill Lynch & Company, Inc., via personal service of the Complaint upon each of the said Defendants, pursuant to Pa. R.C.P. §440, as appears by Affidavits of Service appearing of record, the two corporate Defendants having been served at their place of business within Philadelphia County, One Liberty Place, Philadelphia, PA 19103. On the same day, March 17, 1999, the Complaint was reinstated and forwarded to the Sheriff of Delaware County, Pennsylvania, who thereafter served the individual Defendants, Haraburda and Streeter, at Merrill Lynch's Wayne, Pennsylvania office at

200 West Lancaster Avenue, Wayne, Delaware County, Pennsylvania.

15. Denied in that Plaintiffs Complaint speaks for itself.

16. It is specifically denied that Plaintiff is required to arbitrate any claims whatsoever against any Defendant hereto pursuant to arbitration programs of the NASD and/or the NYSE. It is further specifically denied that the Form U-4 is enforceable in any fashion whatsoever.

17. It is admitted that Plaintiffs claims against the Merrill Lynch Defendants arise out of the same operative facts and events. The remaining averments of paragraph 17 of the Motion of Defendants sets forth conclusions of law to which no response is required of Plaintiff, pursuant to the Pennsylvania Rules of Civil Procedure. By way of additional response, but not in derogation of any of the foregoing, the Plaintiff, while denying any agreement whatsoever to arbitrate between himself and Merrill, Lynch, Pierce, Fenner & Smith, Inc. and/or Defendants Streeter and/or Haraburda, Plaintiff alternatively avers that to such extent as the Court may consider that there is a binding agreement to arbitrate, Plaintiff never had any such binding agreement to arbitrate with Merrill Lynch & Company, Inc., the parent corporation of the Defendant Merrill, Lynch, Pierce, Fenner & Smith, Inc.

18. Denied in that the Plaintiff's Complaint speaks for itself. By way of further response, but not in derogation of the foregoing, there is no valid or enforceable agreement to arbitrate between Plaintiff and any Defendant hereto.

19. It is specifically denied that the Plaintiff has ever entered into any valid or enforceable "agreement to arbitrate". In his Complaint, Plaintiff identifies Defendants Haraburda and Streeter as Merrill Lynch employees. However, Plaintiff brings his defamation claims against Defendants Haraburda and Streeter both in their individual capacities, and in their capacities as employees of the corporate Defendants. It is specifically denied, for the reasons hereinbefore set forth, that he was bound by the NASD arbitration code in any respect whatsoever. It is further specifically denied that the Plaintiff is bound to arbitrate any claims against the individual Defendants Haraburda and Streeter, pursuant to the NASD code or any other code of arbitration.

20. Denied as a conclusion of law without need of further response under the Pennsylvania Rules of Civil Procedure.

21. Denied as a conclusion of law without need of further response under the Pennsylvania Rules of Civil Procedure. By way of further response, but not in derogation of the foregoing, it is specifically denied that the Plaintiff has ever entered into any valid and/or enforceable "agreement to arbitrate" as alleged by the Defendants herein. It is further specifically denied that this action filed by the Plaintiff "must be stayed and Plaintiff's claims referred to arbitration", as there is not now and never has been a valid and/or enforceable agreement to arbitrate by the Plaintiff.

WHEREFORE, Plaintiff does pray for an Order denying the Defendants' Motion to Stay Proceedings and to Compel Securities Industry Arbitration; alternatively, should the Court find any legal merit to Defendants' position, the Plaintiff hereby demands a trial by jury on the issue of the e3dstence of an agreement to arbitrate.

Respectfully submitted,

BY: _____
GERARD J. JACKSON, ESQUIRE
Attorney for Plaintiffs

VERIFICATION

Michael Mullett hereby states that he is the Plaintiff in the within action and that the facts set forth in the foregoing Plaintiff's Answer to Motion of Defendants are true and correct, to the best of his knowledge, information and belief. The undersigned understands that this statement is made pursuant to the provisions of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

_____

MICHAEL MULLET

Dated: 4/25/99

APPENDIX I – AFFIDAVIT OF ROGER CASTILLE

Thomas T. Loder, Esquire
Identification No. 43482
RUBIN & ASSOCIATES, P.C.
10 South Leopard Road, Suite 202
Paoli, PA 19301
(610) 408-2002

Attorneys for Defendants

MICHAEL MULLETT	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
Plaintiff,	
v.,	
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MERRILL LYNCH & COMPANY, INC., JACK HARABURDA, and STEPHEN M-STREETER.	FEBRUARY TERM, 1999 NO. 2086
Defendants.	

AFFIDAVIT OF ROGER CASTILE

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF DELAWARE

I, ROGER CASTILE, being duly sworn according to law, do depose and say as follows:

1. I am the Assistant Vice President and Service Manager for the Wayne, Pennsylvania office of Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch").

2. I have reviewed the personnel file. and registration records of Michael Mullett, which are and have been maintained as routine business and compliance records, as required by securities industry regulations, in the ordinary course of business at Merrill Lynch.

3. Attached hereto as Exhibit "A" is a true and correct copy of the current Uniform Application for Securities Industry Registration or Transfer, commonly known and referred to in the securities industry as the "Form (U-4", which was in effect as of the date of Michael Mullett's termination of employment with Merrill Lynch in or about January 1999. This document, hereinafter referred to in short as "The Mullett Form U-4" (Exhibit "A" hereto), has been maintained in the ordinary course of business in Merrill Lynch's registration records.

4. The Mullett Form U-4 was executed and submitted by Michael Mullett to the NASD Central Records Depository ("CRD") in August of 1987 as a condition of his obtaining securities industry registration with and/or through the NASD and NYSE and acting in the capacity of a registered representative of Merrill Lynch up until the date his employment with Merrill Lynch was terminated in or about January 1999.

_____

ROGER CASTILLE

SWORN AND SUBSCRIBED BEFORE ME, the undersigned authority, by ROGER CASTILE who is personally known to me and who executed the foregoing in my presence and who did take in oath this 5th day of April, 1999.

_____
Notary Public

_____
Printed or typed name

My commission expires: May 1, 1999

Notarial Seal
Diane F. Laulis, Notary Public
Radnor Twp., Delaware County
My Commission Expires May 1, 1999